FILED

MAY 3 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MIKE DU TRIEU, Petitioner-Appellant, v. ROBERT W. FOX, Warden, Respondent-Appellee.	No. 17-55265 D.C. No. 2:12-cv-03365-VBF-AJW Central District of California, Los Angeles ORDER

Before: FERNANDEZ and M. SMITH, Circuit Judges, and CHRISTENSEN,* District Judge.

All Judges voted to deny the petition for panel rehearing. Judge M. Smith voted to deny the petition for rehearing en banc and Judges Fernandez and Christensen so recommended. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

* The Honorable Dana L. Christensen, United States District Judge for the District of Montana, sitting by designation.

NOT FOR PUBLICATION

FILED

MAR 25 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MIKE DU TRIEU, Petitioner-Appellant, v. ROBERT W. FOX, Warden, Respondent-Appellee.	No. 17-55265 D.C. No. 2:12-cv-03365-VBF-AJW MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Valerie Baker Fairbank, District Judge, Presiding

Argued and Submitted March 6, 2019
Pasadena, California

Before: FERNANDEZ and M. SMITH, Circuit Judges, and CHRISTENSEN,** Chief District Judge.

California state prisoner Mike Du Trieu appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Dana L. Christensen, Chief United States District Judge for the District of Montana, sitting by designation.

"The procedural default doctrine 'bar[s] federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement.'" *Calderon v. United States District Court*, 96 F.3d 1126, 1129 (9th Cir. 1996) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991)). The California Supreme Court denied Trieu's unexhausted ineffective assistance of counsel claim by applying its procedural bar against successive or piecemeal litigation by citing *In re Clark*, 5 Cal. 4th 750, 767–69 (Cal. 1993). Petitioner contends that the state incorrectly applied the *Clark* procedural rule in this case; however, we may not review the legitimacy of that decision. *See Wood v. Hall*, 130 F.3d 373, 379 (9th Cir. 1997) ("'[a] federal court may not re-examine a state court's interpretation and application of state law.'") (quoting *Schleeper v. Groose*, 36 F.3d 735, 737 (8th Cir. 1994)). Thus, because the State properly raised this affirmative defense and Trieu did not put its adequacy at issue, the bar applies to this case. *See Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir. 2003) (explaining that the petitioner bears the burden to put the procedural rule at issue "by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule.").

Because we find Trieu's claims procedurally defaulted, we need not reach the merits of his petition.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CENTRAL DIVISION

MIKE DU TRIEU, **Petitioner,** **v.** **ROBERT W. FOX, Warden,** **Respondent.**	**No. LA CV 12-03365-VBF-AJW** **FINAL JUDGMENT**

Consistent with this Court's contemporaneously issued Order Adopting the Report and Recommendation of the United States Magistrate Judge Without Objection, Denying the First Amended Habeas Corpus Petition, Dismissing the Action With Prejudice, Directing the Entry of Separate Final Judgment, Directing a Separate COA Ruling, and Terminating the Case, **final judgment is hereby entered in favor of the respondent warden and against petitioner Mike Du Trieu.**

Dated: Wednesday, February 8, 2017

Valerie Baker Fairbank

Valerie Baker Fairbank
Senior United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MIKE DU TRIEU, Petitioner, v. ROBERT W. FOX, Respondent.	**Case No. LA CV 12-03365-VBF-AJW** **ORDER** Adopting Report & Recommendation Without Objection; **Denying First Amended Habeas Petition;** Dismissing the Action With Prejudice; Directing Entry of Separate Final Judgment; Directing Entry of Separate COA Order; **Terminating and Closing the Action (JS-6)**

This is an action for a Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. section 2254. Pursuant to his authority under Fed. R. Civ. P. 72(b)(1), title 28 U.S.C. section 636(b)(1)(B), and C.D. Cal. Local Civil Rule 72-3.3, the United States Magistrate Judge issued a Report and Recommendation ("R&R") on . *See* Case Management / Electronic Case Filing System Document ("Doc") Doc 142.

Pursuant to 28 U.S.C. § 636(b)(1), the Court has reviewed the first amended habeas corpus petition (*see* Docs 1 and 80), respondent's answer filed January 22, 2013 (Doc 49)

and accompanying memorandum, relevant decisions of the California state courts, the other "lodged documents" submitted by respondent in paper form (listed in the January 22, 2013 Notice of Lodging at Doc 50 and the January 24, 2013 Supplemental Notice of Lodging at Doc 55), respondent's Amended Return filed April 23, 2013 (Doc 75), respondent's February 6, 2015 Answer to the first amended petition (Doc 101) and the accompanying Supplemental Notice of Lodging (Doc 102), petitioner's March 6, 2015 Reply (Doc 104), the Magistrate Judge's December 14, 2016 R&R (Doc 142), and the applicable law.

Petitioner has not filed written objections to the R&R within the time allotted by our Local Civil Rule 72-3.4.[1] *See Sudduth v. Soto*, No. LA CV 15-09038, 2016 WL 4035337, *1 (C.D. Cal. July 12, 2016) (Fairbank, J.) ("This Court never rules on an R&R without waiting for the objection deadline to pass, and it will not rule on the R&R here until at least one week after . . . [the] objection deadline elapses . . . ."). Nor has petitioner sought to extend that deadline. Accordingly, the Court proceeds to the R&R without waiting further.

By its terms, Federal Rule of Civil Procedure 72(b)(3) requires a District Judge to conduct de novo review only of those portions of an R&R to which a party has filed timely specific objection. *See, e.g., Jette v. Colvin*, No. 3:13-cv-00719-AC, 2016 WL 4717735, *1 (D. Or. Sept. 7, 2016) (Anna Brown, J.) ("Because no objections to the

---

[1] Both Fed. R. Civ. P. 72(b)(2) and 28 U.S.C. section 636(b)(1) provide that a party may file written objections to an R&R within fourteen days after being served with the R&R. Our Local Civil Rule 72-3.3, however, provides that "[i]f a party is in custody at the time of the filing of the Magistrate Judge's Report, the time for filing objections under F.R. Civ. P. 72(b) shall be shall be twenty (20) days or such further time as the Magistrate Judge may order."

"Consistent with the Federal Rule governing Magistrate Judges and the Federal Magistrates Act, the Court construes that to mean twenty calendar days after the incarcerated party is *served with* the R&R, not merely twenty days after the R&R is filed on the docket." *Crump v. CSP-Los Angeles County's Maintenance-Plant Operations Dep't*, No. LA CV 15-07845, 2016 WL 1610593, *1 n.1 (C.D. Cal. Apr. 21, 2016) (Fairbank, J.), *appeal dismissed* (9th Cir. Dec. 9, 2016).

Magistrate Judge's Findings and Recommendations were timely filed, this Court is relieved of its obligation to review the record *de novo*.") (citing *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009) (citing 28 U.S.C. section 636(b)(1)(C) and *United States v. Howell*, 231 F.3d 615, 622 (9th Cir. 2000)) and *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc)); *Rael v. Foulk*, No. LA CV 14-02987 Doc. 47, 2015 WL 4111295, *1 (C.D. Cal. July 7, 2015) (Fairbank, J.) ("As required by Fed. R. Civ. P. 72(b)(3), the Court has engaged in de novo review of the portions of the R&R to which petitioner has specifically objected . . . ."), *COA denied*, Doc. 53, No. 15-56205 (9th Cir. Feb. 18, 2016).

Conversely, the Ninth Circuit has held that absent a timely objection purporting to identify specific defects in the R&R, the District Judge has no obligation to review the R&R at all. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (district judge must review a magistrate's findings and recommendations de novo if objections are made, "but not otherwise")), *cited by Beard v. Nooth*, 2013 WL 3934188, *1 (D. Or. July 30, 2013) ("For those portions of a magistrate's findings and recommendations to which neither party has objected, the [Federal Magistrates] Act does not prescribe any standard of review.") (also citing *Thomas v. Arn*, 474 U.S. 140, 152, 106 S. Ct. 466, 473 (1985) ("There is no indication that Congress, in enacting [the Federal Magistrates Act], intended to require a district judge to review a magistrate's report.[.]")); *see, e.g., Herring v. Maricopa County Sheriff's Office*, 2016 WL 2754851, *1 (D. Ariz. May 12, 2016) (Campbell, J.) ("No objection has been filed, which relieves the Court of its obligation to review the R&R.") (citing, *inter alia*, *Reyna-Tapia*, 328 F.3d at 1121, and *Thomas*, 474 U.S. at 149); *Hussak v. Ryan*, 2016 WL 2606993, *1 (D. Ariz. May 6, 2016) (Rayes, J.) (same).[2]

---

[2] *Cf. Kohser v. Protective Life Corp.*, 649 F. App'x 774, 777 (**11th Cir.** 2016) ("[W]here a litigant fails to offer specific objections to a magistrate judge's factual findings, there is no requirement of *de novo* review.") (citing *Garvey v. Vaughn*, 993 F.2d 776, 779 w/ n.9 (11th Cir. 1993)); *Smith v. Johnson*, 2012 WL 6726447, *1 (**E.D. Ark.** Dec. 27, 2012) ("No one has objected to Magistrate Judge . . . Young's Proposed Findings and Recommendations . . . . Having reviewed

Accord Kinetic Fuel Technology, Inc. v. Total Fuel Solutions, LLC, 2016 WL 1389616, *1 (W.D.N.Y. Apr. 6, 2016) ("The Court is not required to review de novo those portions of a report and recommendation to which objections were not filed.") (citing *Mario v. P&C Food Markets, Inc.*, 313 F.3d 758, 766 (2d Cir. 2002)).

"**Nonetheless, the Magistrates Act does not *preclude* a district judge from reviewing an R&R to make sure that it recommends a legally permissible and appropriate outcome (based on sound reasoning and valid precedent) if she chooses to do so.**" *Juarez v. Katavich*, 2016 WL 2908238, *2 (C.D. Cal. May 17, 2016) (Fairbank, J.) (citing *Beard*, 2013 WL 3934188 at *1 (although in the absence of objections no review is required, the Magistrates Act "'does not preclude further review by the district judge[] *sua sponte* . . . under a de novo or any other standard") (quoting *Thomas*, 474 U.S. at 154)). "'Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that [w]hen no timely objection is filed, the Court review the magistrate's recommendations for clear error on the face of the record.'" *Juarez*, 2016 WL 2908238 at *2 (quoting *Beard*, 2013 WL 3934188 at *1 (internal quotation marks omitted)).

Out of an abundance of caution, then, the Court has reviewed the R&R. On either clear-error or de novo review, the Court finds no defect of law, fact, or logic in the R&R. Therefore the Court will adopt the R&R and implement its recommendations. *Cf. Hawkins v. Boyd*, 2017 WL 27949, *1 (E.D.N.Y. Jan. 3, 2017) ("This Court, however, will conduct de novo review if it appears that the magistrate judge may have committed plain error. No such error appears here. Accordingly, the Court adopts the R&R . . . .") (internally citing *Spence v. Sup't of Great Meadow Corr. Facility*, 219 F.3d 162, 174 (2d Cir. 2000)).

---

for clear errors of fact on the face of the record, Fed. R. Civ. P. 72(b) (Advisory Committee Notes to 1983 [Edition]), and for legal error, the Court adopts the proposal as modified: . . . ."), *judgment reversed on other grounds*, 779 F.3d 867 (8th Cir. 2015); *Pittman v. Suffolk Cty. P.D.H.Q.*, 2017 WL 75755, *1 (**E.D.N.Y.** Jan. 6, 2017) ("Where no objections to a Report and Recommendation have been filed, 'the district court need only satisfy itself that there is no clear error on the face of the record.'") (district-court citations omitted).

ORDER

The Report and Recommendation is **ADOPTED** without objection.

The petition for a writ of habeas corpus is **DENIED.**

The Court will rule on a certificate of appealability by separate order.

Final judgment will be entered in favor of respondent consistent with this order.

"As required by Fed. R. Civ. P. 58(a), the Court will enter judgment by separate document." *Toy v. Soto*, 2015 WL 2168744, *1 (C.D. Cal. May 5, 2015) (citing *Jayne v. Sherman*, 706 F.3d 994, 1009 (9th Cir. 2013)) (footnote 1 omitted), *appeal filed*, No. 15-55866 (9th Cir. June 5, 2015).

This action is DISMISSED with prejudice.

The case SHALL BE TERMINATED and closed (JS-6).

Dated: Wednesday, February 8, 2017

Valerie Baker Fairbank

Hon. Valerie Baker Fairbank

Senior United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CENTRAL DIVISION

MIKE DU TRIEU, **Petitioner,** **v.** **ROBERT W. FOX, Warden,** **Respondent.**	**No. CV 12-3365-VBF (AJW)** **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Background[1]

Dr. Mohamad Latif was a cardiologist with a medical practice in Glendale, California. Dr. Latif began treating petitioner for hardening in his aortic valve around 1996, and he continued to see petitioner in his office every three to four months after that. Petitioner regularly obtained lab reports on his blood and brought those reports to his appointments with Dr. Latif.

[1] The following factual summary is taken from the opinion of the California Court of Appeal. Independent review of the record confirms that the state court's summary is a fair and accurate one. The Court has substituted "petitioner" for "appellant."

On November 14, 2006, petitioner came for a regularly-scheduled appointment with Dr. Latif and was brought into an examination room. When Dr. Latif entered the room, petitioner was lying on the bed. Petitioner asked Dr. Latif to look at the lab report, so Dr. Latif turned to examine the report. Dr. Latif's back was toward petitioner while he examined the report.

Dr. Latif felt pain in his right shoulder, so he turned around and saw petitioner attacking him with a knife. Dr. Latif stepped backwards and tripped over a treadmill machine. Petitioner continued stabbing Dr. Latif in the left shoulder, lip, and under the left eye. Dr. Latif knocked the knife to the floor, and other employees in the office came and restrained petitioner. Petitioner pointed to the knife and said, "That is my knife." The entire incident lasted about one-and-a-half to two minutes.

Petitioner accused Dr. Latif of killing petitioner's mother, but Dr. Latif's office was unable to verify that petitioner's mother had ever been a patient. Petitioner had never spoken to Dr. Latif about his mother before. Dr. Latif was still suffering from some paralysis in both hands at the time of trial, despite having undergone surgery and physical therapy.

Petitioner was charged by information with one count of attempted willful, deliberate, premeditated murder. It was further alleged that the victim was over 60 years of age and petitioner inflicted great bodily injury on a person over 60 years of age, petitioner personally used a deadly and

dangerous weapon, and he inflicted great bodily injury, causing Dr. Latif to become comatose and suffer paralysis.

During pretrial proceedings, two different defense attorneys raised doubts as to petitioner's mental competence to stand trial pursuant to [California Penal Code] section 1368. Each time a doubt was declared, the court suspended the proceedings and appointed a medical professional to examine petitioner pursuant to Evidence Code section 730. Petitioner was examined by three different medical professionals, and after considering the reports, the court found petitioner mentally competent to stand trial.

A *Marsden* hearing was held on June 28, 2007. (*People v. Marsden* (1970) 2 Cal.3d 118.) Petitioner complained that he did not trust his attorney and that his attorney did not obtain some documents for him. The court denied the motion.

The court subsequently granted petitioner's request to represent himself (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*)), although petitioner changed his mind several times afterward, repeatedly asking for appointed counsel and then asking to represent himself again. Petitioner retained private counsel before trial.

One of the issues petitioner repeatedly raised throughout his *Faretta* requests was his belief that his attorneys were not obtaining evidence he needed or pursuing lab tests he wanted done. The transcripts indicate that the People provided the requested discovery, including documents that were recovered from petitioner, petitioner's statements, tapes of witness statements, police reports, psychologist reports,

paramedic reports, and photographs of the crime scene.

The record also indicates that the court granted petitioner's requests to appoint an investigator, a confessions expert, and an expert in neurology, and authorized funds for the experts. Petitioner requested more funds for the neurology expert at a March 2, 2009 hearing, but the court told petitioner it could not authorize more funds for the expert until it received a report indicating what had already been done. After petitioner's investigator asked to be relieved because petitioner accused her of stealing documents from him, the court agreed to appoint a new investigator.

Petitioner entered a plea of not guilty by reason of insanity. A jury trial was held, at which Dr. Latif was the only witness. The jury found petitioner guilty of attempted murder and found true the allegations that it was deliberate, willful, and premeditated, and that petitioner used a deadly weapon and caused great bodily injury, but found not true the allegation regarding the victim's age.

A jury trial was conducted to determine petitioner's sanity at the time of the offense. Before the trial started, the court conducted a hearing to address petitioner's *Faretta* motion. Petitioner claimed that he told his attorney the reason he attacked Dr. Latif was that the medication prescribed by Dr. Latif had hurt him. He told the court that he did not intend to kill Dr. Latif and that he could have done so had he wanted to. The court denied the motion as untimely, stating that there was a jury "waiting outside." The court also denied the motion based on its observations of

petitioner during the trial, its belief that defense counsel had done a good job, and its belief that petitioner's statements about his motive for the crime would not help his case.

Jeffrey Liu testified on petitioner's behalf. Liu met petitioner while they were both in jail. Liu was born in Taiwan and was familiar with a Chinese philosophy that it is a duty and a moral imperative for a son to avenge wrongdoing to a parent. Liu testified that petitioner was born in China and had repeatedly told Liu and other inmates that he believed Dr. Latif killed his mother, so he was required to avenge her death. Liu tried to persuade petitioner that he was not required to hold to that belief, but petitioner was very "stubborn." Liu further testified that petitioner had been a soldier in China and, according to a psychological evaluation, suffered from post traumatic stress disorder. According to Liu, just before committing the offense, petitioner had learned from a pharmacist that the medications prescribed for him by Dr. Latif could interact in a fatal manner.

The jury found that petitioner was sane at the time of the offense. The court denied petitioner's motion for a new trial. The court sentenced petitioner to a term of life with the possibility of parole, plus five years for the great bodily injury allegation, and imposed and stayed a one-year term for the weapon allegation.

[Lodged Document ("LD") 4 at 2-5 (citations to California Penal Code omitted)].

On appeal, petitioner's appointed counsel raised no issues, but

asked the appellate court to review the record independently pursuant to People v. Wende, 25 Cal. 3d 436, 441 (1979). [LD 17]. Petitioner, however, filed two supplemental briefs, raising the following issues: (1) he was denied his right to cross-examine his accuser; (2) the trial court failed to pay for defense experts; (3) the prosecutor failed to disclose exculpatory information;(4) the trial court failed to suppress petitioner's custodial statements; (5) petitioner was not competent to stand trial; (6) the evidence was insufficient to support the sanity finding; and (7) petitioner was denied his right to represent himself. [LDs 18 & 19]. The California Court of Appeal rejected petitioner's claims and affirmed the judgment. [LD 4]. The California Supreme Court denied review. [LD 6].

Petitioner, proceeding in pro per, filed a petition for a writ of habeas corpus in this Court. On January 28, 2013, the Court appointed counsel to represent petitioner and granted petitioner leave to file an amended petition. Petitioner's First Amended Petition ("FAP") which included a new claim for relief – namely, Ground One, which alleges a claim of ineffective assistance of counsel. The Court granted petitioner's motion for a stay so that he could exhaust his state remedies with respect to this claim. After petitioner exhausted his state remedies, the stay was lifted and respondent filed an answer to the FAP. [Docket No. 101]. Petitioner filed a reply. After petitioner's request to relieve appointed counsel was granted, petitioner filed a supplemental reply.

Petitioner's Contentions

Petitioner raises the following claims for relief:

1. "Trial counsel was prejudicially ineffective by failing to investigate petitioner's mental health to support an insanity

defense and by failing to retain and present a mental health expert to support the defense." [FAP at 19-30].

2. "Petitioner was denied his due process rights under the Fifth Amendment by the prosecution's obstruction of crucial evidence." [FAP at 30].

3. "Petitioner was denied his due process rights when requested discovery was not turned over." [FAP at 30].

4. "Petitioner's due process rights were violated when the trial court failed to fund all necessary experts." [FAP at 30].

5. "Petitioner was deprived of his Sixth Amendment right to self-representation when the trial court denied his request to represent himself at the sanity trial." [FAP at 31].

6. "Petitioner was deprived of his Sixth Amendment Confrontation Clause rights." [FAP at 31].

7. "Petitioner's due process rights were violated because petitioner was not competent to stand trial." [FAP at 31].

8. "Petitioner ... was not legally []sane at the time of the offense." [FAP at 32].

9. "Petitioner's Fifth and Sixth Amendment rights were violated when the trial court failed to suppress his statements made to law enforcement while in custody." [FAP at 32].

Standard of Review

A federal court may not grant a writ of habeas corpus on behalf of a person in state custody

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

> Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). As used in section 2254(d)(1), the phrase "clearly established federal law" includes only the holdings of the Supreme Court's decisions at the time of the state court decision. Howes v. Fields, 132 S.Ct. 1181, 1187 (2012).

Under section 2254(d)(1), a state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" about the correctness of the state court's decision. Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). This is true even where a state court's decision is unaccompanied by an explanation. In such cases, the petitioner must show that "there was no reasonable basis for the state court to deny relief." Harrington, 562 U.S. at 98.

Under section 2254(d)(2), relief is warranted only when a state court decision based on a factual determination is "objectively unreasonable in light of the evidence presented in the state-court proceeding." Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011) (quoting Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004)).

Finally, state court findings of fact – including a state appellate court's factual summary – are presumed to be correct unless petitioner rebuts that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); see Slovik v. Yates, 556 F.3d 747, 749 n. 1 (9th Cir. 2009). This presumption applies even when conducting de novo review. See Lewis v. Mayle, 391 F.3d 989, 996 (9th Cir. 2004) (applying de novo standard of review "while deferring to any factual finding made by the state

court").

Discussion

1. Ineffective assistance of counsel

Petitioner alleges that he received ineffective assistance of counsel because trial counsel failed to investigate petitioner's mental health and present an expert to support the insanity defense. [FAP at 19-30].

The California Supreme Court denied this claim with citation to In re Clark, 5 Cal. 4th 750, 767-769 (1993) [LD 22], indicating that it rejected the petition as successive.[2] See Rangel v. Biter, 2014 WL 6976172, at * 2 n. 4 (C.D. Cal. June 16, 2014) ("the California Supreme Court's citation to Clark, 5 Cal. 4th at 767-69 signifies that such court rejected the Second State Petition as piecemeal/successive"). Where the highest state court has rejected a claim based upon a procedural rule, the AEDPA does not apply, and federal habeas corpus review is de novo. See Cone v. Bell, 556 U.S. 449, 466-467, 472 (2009);

---

[2] Respondent argues that federal review is precluded by the doctrine of procedural default and, in the alternative, that the claim lacks merit. [Docket No. 101]. Respondent's argument appears correct. Numerous courts have concluded that California's bar against repetitious and piecemeal litigation constitutes an independent and adequate state law ground that bars federal habeas corpus review. See, e.g., Smith v. Biter, 2015 WL 7751949, at *19 (C.D. Cal. Oct. 9, 2015), report and recommendation adopted, 2015 WL 7758505 (C.D. Cal. Nov. 30, 2015); Bucci v. Busby, 2014 WL 4249669, at *12 (E.D. Cal. Aug. 27, 2014), report and recommendation adopted, 2014 WL 5501182 (E.D. Cal. Oct. 30, 2014); Stoot v. Gipson, 2014 WL 1364903, at *6 (C.D. Cal. Jan. 23, 2014). Petitioner argues that the successive petition bar is not consistently applied and, alternatively, that he can overcome a procedural default in this Court by showing cause and prejudice or a miscarriage of justice. [Docket No. 75 at 10; Docket No. 104 at 2-4]. Because the Court concludes that petitioner is not entitled to relief on the merit of this claim, it need not resolve the procedural defense. See Lambrix v. Singletary, 520 U.S. 518, 525 (1997) (a district court may address the merits without reaching procedural issues where doing so best serves the interest of judicial economy).

Scott v. Ryan, 686 F.3d 1130, 1133 (9th Cir. 2012).

Not long before his trial was scheduled to begin, petitioner retained attorney Alan Ross to represent him. [RT 255-257]. Soon thereafter, petitioner entered a plea of not guilty by reason of insanity ("NGI"). [RT 256-261].

In California, a defendant may rely upon evidence of a mental disease to show that although he committed the crime, he was legally insane, meaning that as a result of his mental condition, he was unable either to understand the nature and quality of the criminal act or to distinguish right from wrong when the act was committed. See Cal. Penal Code § 25(b); People v. Elmore, 59 Cal. 4th 121, 140 (2014). The defendant bears the burden of proving by a preponderance of the evidence that he was legally insane when he committed the crime. Cal. Penal Code § 25(b); Cal. Evid. Code § 522; see People v. Mills, 55 Cal. 4th 663, 672 (2012) ("Notably, a defendant may suffer from a diagnosable mental illness without being legally insane under [California law].").

Based upon his plea, petitioner had the right be examined by two court-appointed psychiatrists or psychologists with at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders, and he could offer their reports and testimony at trial. Cal. Penal Code §§ 1027(a), (b), (e). In his declaration, Ross explains that he "persuaded" petitioner to waive these rights. Ross never requested appointment of an expert and never obtained an evaluation of petitioner's sanity at the time of the offense. [FAP, Ex. A ("Ross Decl.") ¶¶ 7-8].

During a pretrial conference, both the trial court and the prosecutor urged the defense to call an expert. The court broached the issue first:

> THE COURT: It seems to me that in order to succeed in an insanity defense, you have to be able to establish a mental disease or defect. It doesn't seem to me that that can be done without psychiatric testimony of some sort . . . .
>
> MR. ROSS: I don't think you need a psychological expert. I think that mental disorder is something that juries can make a decision about.
>
> THE COURT: But the law requires a mental disease or defect. How do you establish a mental disease or defect without a psychiatric expert?
>
> MR. ROSS: Simply because this man had a delusion that Dr. Latif was somehow responsible for the death of his mother. There is no evidence whatsoever that anything like that ever happened. It is something that was fixed in his mind but is not true. And I think a delusion qualifies as a defect.
>
> THE COURT: If there was a psychological opinion or some kind of psychological evidence that, in fact, it was a delusion. I'm not sure what Mr. Liu's qualifications are to state that petitioner is delusional.

[RT 4-5]. The prosecutor agreed, offering his "brief, unsolicited opinion that it is perhaps preferable to have an expert." [RT 6].

Following additional discussion about the need for an expert to support an insanity defense, Ross told the trial court that People v. Skinner, 39 Cal. 3d 765 (1985) supported his argument that "it is sufficient [evidence of insanity] if the defendant believed that what he was doing is morally right." [RT 9]. The trial court was skeptical that Skinner allowed an insanity defense to succeed without expert testimony,

observing that in Skinner, "there was psychiatric evidence of a mental disease." [RT 10]. The trial court asked Ross whether he knew of any authority for the proposition that an insanity defense could proceed without psychiatric testimony. Ross did not. [RT 10-11]. Later, after conducting further research, Ross cited People v. Wolff, 61 Cal. 2d 795 (1964) for the proposition that "insanity may be proved by circumstantial evidence." [RT 74].

During the guilt phase of the trial, Ross presented no witnesses or evidence on behalf of petitioner. In closing argument, Ross contended that petitioner did not premeditate the attempted murder, but conceded that petitioner harbored the intent to kill, used a knife, and caused great bodily injury. [RT 120]. The jury deliberated for less than an hour before finding petitioner guilty. [RT 270-277].

During the sanity phase of the trial, Ross attempted to show that petitioner's cultural beliefs obligated him to avenge his mother's death, and that at the time he committed the offense, petitioner was suffering from the delusion that Dr. Latif had killed his mother. To accomplish this, Ross called a single witness: Jeffrey Liu, a convicted felon who became acquainted with petitioner while in jail. [RT 168-169]. Liu, who had no training as a mental health expert, testified about petitioner's background and cultural beliefs, not about his mental status. [RT 169-197].

The Sixth Amendment guarantees that a criminal defendant will not be convicted without the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-686 (1984). In order to establish ineffective assistance of counsel, petitioner must identify the acts or omissions of counsel that were not the result of reasonable professional judgment, and he must show a reasonable probability that but for his

counsel's errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 690, 694; see Knowles v. Mirzayance, 556 U.S. 111, 123, 127 (2009). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see Knowles, 556 U.S. at 127.

A claim of ineffective assistance of counsel based upon an alleged failure to investigate requires petitioner to show what information would have been revealed by the investigation and how that information would have produced a different result. See Gallego v. McDaniel, 124 F.3d 1065, 1077 (9th Cir. 1997) (rejecting a claim that counsel was ineffective for failing to conduct an adequate investigation where the petitioner did not identify any information that had been uncovered in a subsequent investigation, which, if known at the relevant time, would have changed the outcome of the proceedings), cert. denied, 524 U.S. 917 (1998).

Because petitioner bears the burden of satisfying both prongs of the Strickland standard, a federal court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Strickland, 466 U.S. at 697.

Ross's performance fell below reasonable professional standards. His decision to forego psychiatric examination on the issue of petitioner's sanity was based upon "information contained in the competency reports." [Ross Decl. ¶ 7]. Those reports, however, addressed petitioner's mental status at the time of the trial, and had no bearing on petitioner's sanity at the time he stabbed Dr. Latif. Thus, the

reports did not render psychiatric evidence probative of petitioner's sanity defense unnecessary.[3] The record also suggests that Ross did not believe that psychiatric evidence was required to show that petitioner suffered rom a mental disease or defect. The case upon which Ross relied, however, contains no language supporting his assertion. Rather, that case held only that a jury could find a defendant sane despite expert testimony to the contrary. Wolff, 61 Cal. 2d at 804.

Ross had no reasonable strategic justification for proceeding with the defense of insanity without obtaining an evaluation and calling an expert to testify that petitioner was in fact insane at the time of the offense. His choice to rely upon a convicted felon with no relevant medical expertise[4] rather than a psychiatric expert fell outside the range of reasonable professional assistance.

Petitioner has failed to show that further investigation would have uncovered evidence supporting a defense of insanity. The record lacks any evidence suggesting that petitioner was legally insane. Specifically, petitioner still has not presented any evidence revealing that petitioner suffered from a mental disease or defect at the time of the offense, and has failed to identify any expert who could have offered favorable evidence at the sanity hearing. Because petitioner

---

[3] Ross claims that he is "aware that evaluation for competency for trial which speaks of time current court proceedings [sic] is different from evaluation for sanity which speaks as of time of the crime alleged." [Ross Decl. ¶ 7.]

[4] Not only was Liu's testimony legally insufficient to support an insanity defense, a portion of it actually undermined the argument that petitioner was under a delusion that Dr. Latif had killed his mother. Specifically, Liu testified that petitioner told him that when he went to fill prescriptions provided to him by Dr. Latif, the pharmacist informed him that the combination of medications could be fatal.[RT 195]. Because petitioner's mother had taken the same combination of medications, petitioner came to believe that Dr. Latif had killed his mother and was trying to kill him, too. [RT 195-197].

does not identify any exculpatory evidence, he cannot demonstrate a reasonable likelihood that, if trial counsel had consulted mental health experts and presented their testimony at the sanity hearing, the jury would have found petitioner legally insane. See Gonzalez v. Knowles, 515 F.3d 1006, 1015-1016 (9th Cir. 2008)("As to the failure to investigate mental health mitigation, Gonzalez does not contend that he actually suffered from a mental illness; he merely argues that if tests had been done, and if they had shown evidence of some brain damage or trauma, it might have resulted in a lower sentence. Such speculation is plainly insufficient to establish prejudice."); Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir.) (petitioner's speculation that a witness might have provided helpful information if interviewed is not enough to support an ineffective assistance of counsel claim), amended, 253 F.3d 1150 (9th Cir. 2001); Jackson v. Calderon, 211 F.3d 1148, 1155 (9th Cir. 2000) (unsupported speculation and conclusory allegations of ineffective assistance of counsel are not sufficient to show either deficient performance or prejudice), cert. denied, 431 U.S. 1072 (2001); Jones v. Gomez, 66 F.3d 199, 204-205 (9th Cir. 1995) (same).

2. Suppression of evidence

In Grounds Two and Three, petitioner alleges that the prosecution suppressed "possibly" exculpatory evidence – namely, medical reports suggesting that Dr. Latif's injury was not the result of petitioner's actions. [FAP at 30]. According to petitioner, the prosecution "suppressed" or "obstructed" Dr. Neville's report that Dr. Latif received superficial wounds, Dr. Segal's report that Dr. Latif did not kill petitioner's mother, and Dr. Casiano's report that petitioner was suffering from Post Traumatic Stress Disorder as a result of his

military service in Vietnam.[5] [Petition at 9-12].[6] Petitioner contends that the reports would have supported his claim that he only intended to scare Dr. Latif, and did not intend to kill him. In addition, petitioner alleges that the prosecution did not provide discovery responses disclosing evidence that favored the defense including reports, statements, and photographs from Drs. Neville, Segal, and Casino. He also complains about the failure to provide him with unidentified "police reports," "medical reports," and "crime scene photographs." [FAP at 30; Petition at 13-15].

Due process requires the prosecution to disclose to the defense any evidence that is material either to guilt or to punishment. Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987); United States v. Bagley, 473 U.S. 667, 674 (1985); Brady v. Maryland, 373 U.S. 83, 87 (1963). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood v. West Virginia, 547 U.S. 867, 870 (2006) (per curiam) (citations and internal quotation marks omitted); Strickler v. Greene, 527 U.S. 263, 280 (1999). Petitioner has the "burden of showing that withheld evidence is material." United States v. Si, 343 F.3d 1116, 1122 (9th Cir. 2003).

The Court must assess whether the withheld evidence is material "in the context of the entire record." United States v. Agurs, 427 U.S. 97, 112 (1976); see United States v. Wilkes, 662 F.3d 524, 535 (9th Cir.

---

[5] Petitioner mistakenly refers to these doctors as Dr. Seagoal and Dr. Castellano.

[6] The original petition ("Petition") included additional, more particularized allegations regarding these claims. In the interest of judicial economy, the Court refers to the original petition where doing so helps to clarify the factual basis for petitioner's claims.

2011) ("'Suppressed evidence must be considered collectively, not item by item, and is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'") (quoting Hein v. Sullivan, 601 F.3d 897, 906 (9th Cir. 2010)). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Agurs, 427 U.S. at 109-110.

The California Court of Appeal discussed the Brady standard and rejected petitioner's argument that the government suppressed evidence on two separate grounds. First, it found that "[t]he record indicates that petitioner received all the requested discovery." [LD 4 at 6]. Second, it held that even if the prosecution had failed to disclose certain items, petitioner also "failed to meet his burden to show a reasonable probability of a different result, had any further evidence been disclosed." [LD 4 at 6-7 (citations omitted)].

The record supports the appellate court's finding that the prosecution provided petitioner all of the discovery to which he was entitled. Specifically, the record reflects that after petitioner elected to proceed pro per, the prosecution turned over "about eight inches" of discovery that previously had been produced to defense counsel, including photographs of the crime scene, police reports, paramedic reports, psychological reports, psychiatric reports, documents recovered from petitioner, statements from petitioner, and tapes of statements from witnesses. [RT F1-F2, I3, I5-I8, J15, K5-K8, K17]. On March 2, 2009, petitioner requested transcripts of his statements to the police and witness statements, which previously had been provided to petitioner's trial counsel in the form of audio tapes. The trial court

agreed to work with the prosecutor to have the transcripts prepared. [RT I1-I5]. After considering an exhaustive list of petitioner's discovery requests, including witness statements, psychological reports, police reports, paramedic reports, emergency room reports, firefighter reports, and photographs of the crime scene, the trial court determined that the prosecutor either had already produced the items or she would make the appropriate requests for them. [RT I5-I8].

On March 3, 2010, while still representing himself, petitioner claimed that the prosecutor had not produced certain psychological reports. [RT K3]. The prosecutor provided the trial court with two signed letters from Simon Aval, petitioner's standby counsel, dated January 30, 2009 and Mach 5, 2009, indicating that he had been given thirty-five pieces of discovery, including the audio recording and transcript ordered by the trial court. The prosecutor also provided the trial court with a letter from petitioner dated September 9, 2009, indicating that petitioner had been provided with forty-nine items of discovery after having lost his initial set. [RT K3-K5].

The prosecutor further indicated that petitioner had received copies of all the reports in her possession, including reports from Drs. Gock, Sharma, and Kojian. She also told the court that the State had not received any reports from Drs. Segal or Casiano. [RT J15, K5-K6].

The trial court inferred that if any such reports existed, they must have been generated by the defense. [RT K6]. Implicitly crediting the prosecutor's representations, the trial court did not order the prosecution to provide additional responses to petitioner's discovery requests.[RT K6].

As the trial court's ruling suggests, with respect to Dr. Casiano, any report stating that petitioner suffered from Post Traumatic Stress

Disorder would have been generated on behalf of the defense, and was not in the control of the prosecution. Thus, the prosecution could not have "suppressed" it.

With respect to the reports of Dr. Segal and Dr. Neville, petitioner has not demonstrated that the evidence was material. Dr. Segal's report that Dr. Latif did not kill petitioner's mother would add little or nothing to petitioner's defense because the prosecution proceeded on the assumption that Dr. Latif did not kill petitioner's mother. Indeed, considering that the prosecution presented evidence that Dr. Latif had never even treated petitioner's mother, Dr. Segal's "report" that Dr. Latif did not kill petitioner's mother would be cumulative. Similarly, Dr. Neville's report that Dr. Latif received superficial wounds would have had little bearing on petitioner's defense – namely, that he was legally insane at the time he stabbed Dr. Latif and that he did so because he had a delusional belief that Dr. Latif was responsible for his mother's death. Further, and contrary to petitioner's belief, even if true, evidence that petitioner inflicted superficial wounds would not have demonstrated that he was innocent of attempted murder. See People v. Avila, 46 Cal.4th 680, 702 (2009) (rejecting the argument that severe injury is required to uphold an attempted murder conviction, explaining that "the degree of the resulting injury is not dispositive of defendant's intent. Indeed, a defendant may properly be convicted of attempted murder when no injury results."); People v. Gonzalez, 126 Cal. App. 4th 1539, 1552 (2005) ("The fact that [defendant] missed [the victim's] heart and lungs was fortuitous rather than indicative of the absence of an intent to kill.")

In sum, notwithstanding his conclusory assertions, petitioner points to nothing demonstrating that the prosecution withheld any

evidence from the defense, let alone exculpatory evidence.

Finally, although not entirely clear, petitioner's allegations suggest that he might be claiming that some or all of this "favorable" evidence was "suppressed" because it was excluded based upon a motion filed by the prosecutor. The record, however, belies any such contention.

3. Failure to pay for defense experts

In Ground Four, petitioner alleges that he was denied due process by the trial court's failure to fund two necessary defense experts: Dr. Shapiro (a neurologist) and Dr. Costanzo (an expert on confessions). [FAP at 30; See Petition at 16].

In response to petitioner's request, the trial court allowed the payment of up to $750 each to Drs. Shapiro and Costanzo. [See Petition, Exhibit ("Ex.") D; CT 145]. When petitioner sought additional funding for Dr. Shapiro that the trial court told him that it could not authorize more payments without a report showing what Dr. Shapiro had accomplished. [RT J5-J8]. With regard to Dr. Costanzo, the record does not reveal any request for payment that was denied. Instead, when petitioner accused Dr. Costanzo of failing to contact him, the trial court told him that it could not give him advice, stating "[t]hat's one of the risks you take in representing yourself. You have to figure it out, not me." [RT J17].

The California Court of Appeal considered and rejected petitioner's claim that the trial court's refusal to fund the necessary experts violated his right to present a defense because "[t]he trial court record and the superior court order regarding the appointment of defense experts, attached to petitioner's supplemental brief, indicate that the court appointed and authorized funds for experts and investigators as

requested by petitioner." [LD 4 at 6].

In support of this claim, petitioner relies upon Ake v. Oklahoma, 470 U.S. 68 (1985). [FAP at 30]. In Ake, the Supreme Court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 470 U.S. at 83. The Supreme Court has declined to address whether the Constitution requires the appointment of a non-psychiatric expert. See Caldwell v. Mississippi, 472 U.S. 320, 323-324 n. 1 (1985) (declining "to determine as a matter of federal constitutional law what if any showing would have entitled [the petitioner]" to the appointment of fingerprint and ballistics experts, where the petitioner "offered little more than undeveloped assertions that the required assistance would be beneficial").

Petitioner's claim lacks factual support. The record reveals that the trial court did not fail to "fund" experts. To the contrary, the trial court granted petitioner's request to pay two experts, then declined to provide additional funds for one of the experts, but only until petitioner complied with a reasonable request for a report indicating what the expert had done to date. Thus, there is no factual basis for petitioner's claim that the court improperly denied a request for funding.

Moreover, while a state must provide an expert when an indigent defendant's sanity is an issue at trial, the Supreme Court has not extended this holding beyond the appointment of a psychiatric expert. See Jackson v. Ylst, 921 F.2d 882, 885-886 (9th Cir. 1990) (noting that

the Supreme Court had not extended Ake "to encompass an indigent defendant's request for the appointment of an expert on eyewitness identification"). Thus, at least with respect to Dr. Costanzo, petitioner's claim fails because no clearly established Supreme Court law requires the appointment of a "confessions expert." See Jackson, 921 F.2d at 886-887 (noting that a decision holding unconstitutional a trial court's denial of application for appointment of eyewitness expert would constitute a "new rule," the retroactive application of which would be barred by Teague v. Lane, 489 U.S. 288 (1989)); Weeks v. Angelone, 176 F.3d 249, 264-266 & n. 9 (4th Cir. 1999) (holding that Ake and Caldwell do not establish a criminal defendant's constitutional right to assistance of non-psychiatric experts such as pathology and ballistics experts, and that because the petitioner's claim was barred by Teague, it necessarily also was barred by 28 U.S.C. § 2254(d)), aff'd on other grounds, 528 U.S. 225 (2000); Sanchez v. Hedgpeth, 706 F. Supp. 2d 963, 988-989 (C.D. Cal. 2010) (denying habeas corpus relief because "the Supreme Court has not clearly established a constitutional right to the appointment of forensic experts"); see generally Moses v. Payne, 555 F.3d 742, 758-759 (9th Cir. 2009) (explaining that habeas corpus relief is unavailable where the Supreme Court has articulated no "controlling legal standard" on the issue).

Finally, petitioner has not shown that either Dr. Shapiro or Dr. Costanzo would have provided testimony helpful to the defense. Thus, any error was harmless. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (even where there has been constitutional error, relief is warranted only if that error had a "substantial and injurious effect or influence in determining the jury's verdict").

4. Denial of the right of self-representation

In Ground Five, petitioner claims that the trial court deprived him of his right to represent himself at the sanity trial. [FAP at 31; Petition at 17-18].

After the jury found petitioner guilty of attempted murder, the trial court and the prosecutor sought to explain to petitioner the difference between a sentence in state prison and confinement in a mental health institution. [RT 146-152]. During this conversation, petitioner stated that his trial counsel had "sold [him] out without a fight." [RT 153]. The trial court responded that petitioner had benefitted by trial counsel's representation. [RT 153].

Petitioner then informed the trial court that he wanted to represent himself at the sanity trial. [RT 153-154]. The trial court cleared the courtroom to conduct a Marsden[7] hearing, petitioner explained that he wanted to represent himself because he could "do it better." [LD 16 154-155]. Petitioner said that Dr. Latif had prescribed him "bad" medication, and that was why he stabbed Dr. Latif. [LD 16 155-156]. Petitioner also said that he did not want to kill Dr. Latif, just cut him, explaining that if he had wanted to kill him, he possessed the specialized military training to do so. [LD 16 at 156-157].

The trial court denied petitioner's request to represent himself, stating:

> That motion is denied because we are both in the midst of the trial of this matter with the jury waiting outside. That's the first thing. It is way too late to make a Faretta motion

---

[7] People v. Marsden, 2 Cal.3d 118, 123-125 (1970) provides that under certain circumstances, a defendant may be entitled to discharge his appointed counsel and have a new lawyer appointed to replace him or her.

> to represent yourself. So ..., based on everything I know about this case and based on my observations when you were representing yourself and based on the statements that you have made today, I'm denying that motion.
>
> * * *
>
> [Petitioner]: – No one give me a chance, and he sold me out for nothing.
>
> [The Court]: Once again, he did not sell you out. I'm trying to prevent you – okay. Stop. Stop. Stop. He did not sell you out. He's trying to represent you. And frankly, what you are seeming to want to do is just that: to sell yourself out. The evidence that you are talking about does not say what you are saying it says, which underscores my earlier rulings on the matter.

[LD 16 157-159].

The Sixth Amendment guarantees a criminal defendant the right to represent himself. Faretta v. California, 422 U.S. 806, 820-821 (1977); accord Indiana v. Edwards, 554 U.S. 164, 170–171 (2008). A defendant's request to represent himself, "must be accepted so long as the request is unequivocal, timely (i.e., made before the jury is empaneled), and not intended to secure a delay in the proceedings." Burton v. Davis, 816 F.3d 1132, 1159 (9th Cir. 2016).

With regard to the timeliness requirement, "Faretta does not articulate a specific time frame pursuant to which a claim for self-representation qualifies as timely. It indicates only that a motion for self-representation made 'weeks before trial' is timely." Stenson v. Lambert, 504 F.3d 873, 884 (9th Cir. 2007), cert. denied, 555 U.S. 908 (2008). Consequently, the denial of a motion made on the morning of

trial on the ground that it is untimely is neither contrary to nor an unreasonable application of clearly established federal law. Stenson, 504 F.3d at 884.

The California Court of Appeal applied Faretta in rejecting petitioner's claim. The appellate court concluded that the trial court properly denied petitioner's request to represent himself at the sanity trial, explaining that the trial court "considered the quality of defense counsel's representation of petitioner, the reasons for the request, and the stage of the proceedings." [LD 4 at 8].

Petitioner's claim fails because his Faretta request was made in the middle of trial, while the jury was waiting.[8] The state court's determination that the request was untimely was neither contrary to, nor an unreasonable application of, Faretta. See Marshall v. Taylor, 395 F.3d 1058, 1062 (9th Cir.) ("In the absence of clear Supreme Court precedent defining when a Faretta request becomes untimely, the California Court of Appeal was free to determine that ... [petitioner's] request on the date of trial was untimely."), cert. denied, 546 U.S. 860 (2005); Turner v. Price, 2016 WL 1394282, at *8 (N.D. Cal. Apr. 8, 2016) (finding that a Faretta request made five days before trial was properly denied as untimely); Garcia v. Beard, 2015 WL 7960749, at *6 (C.D. Cal. Sept. 3, 2015) (finding that a Faretta motion made the day before trial was properly denied as untimely), report and recommendation adopted, 2015 WL 8022982 (C.D. Cal. Dec. 4, 2015).

5. Denial of the right to cross-examine Dr. Latif

In Ground Six, petitioner argues that the trial court deprived him

---

[8] Furthermore, the trial already had been delayed for approximately four years, partly because of petitioner's repeated attempts at self-representation, followed by his renewed invocation of his right to counsel. [See RT J12-J13].

of his rights under the Confrontation Clause because he was not afforded the opportunity to adequately cross-examine Dr. Latif. [FAP at 31; Petition at 19-20].

The Sixth Amendment guarantees to an accused in a criminal proceeding the right "to be confronted with the witnesses against him." Davis v. Washington, 547 U.S. 813, 821 (2006); Crawford v. Washington, 541 U.S. 36, 42 (2004). Nevertheless, the trial court retains wide latitude to impose reasonable limitations on the scope of cross-examination. Delaware v. Fensterer, 474 U.S. 15, 20 (1985).

The California Court of Appeal concluded that petitioner's "right to cross-examine witnesses under Crawford was not violated because his attorney cross-examined Dr. Latif." [LD 4 at 6]. The record confirms that petitioner's counsel was permitted to, and did, cross-examine Dr. Latif during the guilt trial. [See RT 80-81]. Petitioner does not cite, and the Court cannot find, anything in the record indicating that the trial court limited cross-examination of Dr. Latif.

It may be that petitioner claims that he was denied the opportunity to personally cross-examine Dr. Latif notwithstanding that he was represented by counsel. To the extent that he makes such a claim, it fails because neither Crawford nor any other Supreme Court holding establishes such a right.

6. Competency to stand trial

In Ground Seven, petitioner alleges that he was not competent to stand trial. [FAP at 31; Petition at 21-22].

During pretrial proceedings, two different trial attorneys raised doubts about petitioner's competence to stand trial. [RT A8, D2]. On June 28, 2007, petitioner's counsel declared a doubt as to petitioner's competency, and the trial court suspended the proceedings. On July 26,

2007, the trial court appointed Dr. Haig Kojian to evaluate petitioner's mental state pursuant to California Penal Code section 1368. [CT 75]. Dr. Kojian concluded that petitioner knew and understood the charges against him and the possible plea agreements, but opined that petitioner was "not competent to attempt to defend himself pro per." [LD 12 at 4-5, 7]. Dr. Kojian indicated that petitioner needed to be re-interviewed. [LD 12 at 7].

After considering Dr. Kojian's report, the trial court appointed Dr. Aushal Sharma to evaluate petitioner. [CT 74-77]. Dr. Dharma examined petitioner, and concluded petitioner's "non cooperation with his attorney is not due to mental illness but reasons unrelated to mental illness and he is competent to stand trial." [LD 14 at 3].

The trial court considered both reports and, on October 17, 2007, found petitioner mentally competent to stand trial. [CT 83-84].

On October 9, 2008, new trial counsel declared a doubt as to petitioner's competency. The trial court again suspended proceedings and appointed Dr. Terry Gock to evaluate petitioner. [CT 101]. Dr. Gock concluded that petitioner did not suffer from any serious mental disorder and was competent to stand trial, "including being able to cooperate rationally with his counsel in preparing for his defense." [LD 15 at 2].

On October 13, 2008, after considering Dr. Gock's report, the trial court found petitioner mentally competent to stand trial. [CT 106-107].

The conviction of a defendant while he is incompetent violates due process. Indiana v. Edwards, 554 U.S. 164, 170 (2008); Drope v. Missouri, 420 U.S. 162, 171 (1975). Competence to stand trial requires that the defendant have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to

assist in preparing his defense." Drope, 420 U.S. at 171; see Douglas v. Woodford, 316 F.3d 1079, 1094 (9th Cir. 2003) ("To be competent to stand trial, a defendant must demonstrate an ability 'to consult with his lawyer with a reasonable degree of rational understanding' and a 'rational as well as factual understanding of the proceedings against him.'") (quoting Godinez v. Moran, 509 U.S. 389, 396 (1993) (internal quotations and citation omitted)).

In addition, in order to protect against the trial of an incompetent defendant, the Supreme Court has required that a trial court confronted with evidence raising a bona fide doubt about a defendant's competency must order a competency hearing sua sponte. Pate v. Robinson, 383 U.S. 375, 385 (1966). Evidence that may suggest a defendant is incompetent includes evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial. Drope, 420 U.S. at 180 (quoting Pate, 383 U.S. at 385); see Maxwell v. Roe, 606 F.3d 561, 568 (9th Cir. 2010). Finally, a federal court determining whether a state trial judge should have conducted a competency hearing considers only evidence before the trial judge. McMurtrey v. Ryan, 539 F.3d 1112, 1118-1119 (9th Cir. 2008).

The California Court of Appeal rejected petitioner's claim, explaining:

> The record indicates that the trial court twice suspended the proceedings, ordered evaluations of [petitioner's] mental competence by three medical professionals, and subsequently found him competent based on the medical evaluations. The trial court's finding is supported by substantial evidence.

[LD 4at 7-8].

Given that the trial court appointed three mental health experts to

evaluate petitioner at two points in the proceedings, and that it relied on their reports to decide that he was competent, the state appellate court's determination was neither an unreasonable application of federal law nor an unreasonable determination of the facts in light of the evidence.

7. Insanity

In Ground Eight, petitioner contends that he was legally insane at the time of the offense. [FAP at 32; Petition at 23-26].

The federal basis for petitioner's claim is not clear. The Supreme Court "ha[s] not said that the Constitution requires the States to recognize the insanity defense." Medina v. California, 505 U.S. 437, 449 (1992) (citing Powell v. Texas, 392 U.S. 514, 536-537 (1968)). Perhaps the "nearest analog" to petitioner's claim is a challenge to the sufficiency of the evidence. See Hawkins v. Horel, 2010 WL 702263, at *9 (N.D. Cal. 2010), aff'd, 572 Fed. App'x 480 (9th Cir. 2014). However, such a challenge with regard to a sanity determination is not cognizable because under California law, insanity is an affirmative defense on which the defendant bears the burden of persuasion. See People v. Hernandez, 22 Cal. 4th 512, 522 (2000); Cal. Evid. Code § 522.

Assuming petitioner could proceed on such a claim, the controlling Supreme Court law would be that evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). If the facts support conflicting inferences, a reviewing court "must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that

resolution." Jackson, 443 U.S. at 319, 326; see also Long v. Johnson, 736 F.3d 891, 896 (9th Cir. 2013) ("[W]e must resolve doubts about the evidence in favor of the prosecution and, in addition, must examine the state courts' decisions through the lens of AEDPA.").

The California Court of Appeal rejected petitioner's claim, explaining that it "presents a factual issue to be decided by the trier of fact .... The jury found petitioner sane at the time of the offense. [He] has failed to meet his burden of establishing by a preponderance of the evidence that he was insane at the time of the offense." [LD 4 at 8].

As previously discussed, the defense presented no evidence that petitioner suffered from a mental disease or defect at the time he stabbed Dr. Latif, so the jury's verdict was rational in light of the evidence. The state court's rejection of petitioner's claim was neither an unreasonable application of federal law nor an unreasonable determination of the facts in light of the evidence. Petitioner essentially asks this Court to reweigh the jury's determination that he was sane at the time of the offense, something that this Court may not do. Accordingly, he is not entitled to relief on the basis of this claim. See Hawkins, 2010 WL 702263, at *9 (assuming that a challenge to the jury's sanity determination was cognizable, the claim failed because "[e]vidence was presented upon which a rational juror could find that Petitioner had not met his burden to prove his lack of sanity"); Pop v. Yarborough, 354 F. Supp. 2d 1132, 1138-1139 (C.D. Cal. 2005) (assuming that such a claim was cognizable, it failed because the burden was on the petitioner to show by a preponderance of the evidence that he was insane when he committed the murders, and the fact finder's determination could not be overturned unless, as a matter of law, it

could not have reasonably rejected the evidence of insanity).

8. Failure to suppress petitioner's statements

In Ground Nine, petitioner alleges that the trial court failed to suppress statements he made to law enforcement while in custody – specifically the statement he made while handcuffed on the floor of the medical office. [FAP at 32; Petition at 27-28].

As petitioner concedes, his statements to law enforcement were not presented to the jury in the prosecution's case-in-chief. [FAP at 32]. Petitioner, however, argues that the prosecution "reference[d] [his] confession in opening statements." [FAP at 32].

The record reveals that the prosecutor made the following references to petitioner's statements during his opening statement: (1)"The evidence is going to show that petitioner told persons at the medical facility and police officers that he attempted to kill Dr. Latif because Dr. Latif killed his mother"; and (2) the "circumstances, location, the weapon that [he] brought to the scene, his conduct inside the room, and the statements that he made subsequently to other personnel at the scene and to the police will all show beyond a reasonable doubt that he did intend and did attempt to kill Dr. Latif[.]" [RT 32-33].

The Fifth Amendment privilege against compulsory self-incrimination bars the prosecution from using statements made during custodial interrogation unless the defendant was first warned of and waived his constitutional rights. Miranda v. Arizona, 384 U.S. 436, 444 (1966). "[T]he introduction of a confession obtained in violation of Miranda is reviewed for harmless error." Sessoms v. Grounds, 768 F.3d 882, 896 (9th Cir. 2014) (citing Arizona v. Fulminante, 499 U.S. 279, 295 (1991) (plurality opinion)).

The California Court of Appeal rejected petitioner's argument on two grounds: "(1) no statements to the police by petitioner were admitted; (2) no objection was made in the trial court to any statements, and, unless a defendant asserts in the trial court a specific ground for suppression of his or her statements to police under Miranda, that ground is forfeited on appeal." [LD 4 at 7 (citation omitted)].

Even assuming that the prosecutor's reference to petitioner's statements amounted to a constitutional violation, any error was harmless. The evidence against petitioner was strong and uncontested. Petitioner had known Dr. Latif for many years, petitioner brought a knife to his appointment with Dr. Latif, and when Dr. Latif's back was turned, petitioner pulled out the knife and stabbed Dr. Latif numerous times. The prosecutor's isolated reference to petitioner's statement that he tried to kill Dr. Latif because Dr. Latif killed his mother did not have a substantial or injurious effect on the jury's verdict of guilt. With respect to the sanity trial, the prosecutor's reference to that statement actually provided corroboration for petitioner's insanity defense.

Conclusion

It is recommended that the petition for a writ of habeas corpus be denied.

Dated: December 14, 2016

Andrew J. Wistrich
United States Magistrate Judge

S221738

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re MIKE DU TRIEU on Habeas Corpus.

The petition for writ of habeas corpus is denied. (See *In re Clark* (1993) 5 Cal.4th 750, 767-769.)

Julie Harris

CANTIL-SAKAUYE

Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re	)	B 254737
	)	
MIKE DU TRIEU,	)	(Super. Ct. No. GA067690)
	)	(Suzette Clover, Judge)
on Habeas Corpus.	)	
	)	**ORDER**
	)	
	)	

THE COURT:*

The petition for writ of habeas corpus has been read and considered.

The petition is denied for failure to state facts demonstrating entitlement to the relief requested.

*EPSTEIN, P. J. WILLHITE, J. EDMON, J.**

**Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 01/09/14

CASE NO. GA067690

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: MIKE DU TRIEU

INFORMATION FILED ON 05/25/07.

COUNT 01: 664-187(A) PC FEL

ON 01/09/14 AT 830 AM IN NORTHEAST DISTRICT DEPT NEF

CASE CALLED FOR HABEAS CORPUS PETITION

PARTIES: SUZETTE CLOVER (JUDGE) DAVID DIAZ (CLERK)
NONE (REP) NONE (DDA)

DEFENDANT IS NOT PRESENT IN COURT, AND NOT REPRESENTED BY COUNSEL

THE COURT HAS READ AND CONSIDERED PETITIONER MIKE TRIEU'S PETITION FOR WRIT OF HABEAS CORPUS FILED APRIL 22, 2013, THE INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS FILED OCTOBER 22, 2013, AND THE INFORMAL REPLY TO INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS FILED DECEMBER 9, 2013. ADDITIONALLY, THE COURT TAKES JUDICIAL NOTICE OF ITS OWN FILE, INCLUDING, BUT NOT LIMITED TO, ALL MINUTE ORDERS, MOTIONS,

TRANSCRIPTS, AND RELATED DECISIONAL LAW PERTAINING TO THIS CASE, PURSUANT TO EVIDENCE CODE SECTION 452.

.

PETITIONER ASSERTS HIS TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO INVESTIGATE HIS MENTAL HEALTH TO SUPPORT AN INSANITY DEFENSE AND FOR FAILING TO PRESENT A MENTAL HEALTH EXPERT TO SUPPORT THAT DEFENSE.

.

PETITIONER CLAIMS THIS ISSUE COULD NOT HAVE BEEN RAISED ON APPEAL BECAUSE OF THE NEED FOR ADDITIONAL EVIDENCE OUTSIDE THE RECORD. THE PETITION INCLUDES THE DECLARATION OF DEFENSE COUNSEL, BUT PRESENTS NO DECLARATION OR ANY OTHER EVIDENCE FROM A MENTAL HEALTH EXPERT FINDING OR EVEN SUGGESTING THAT AT THE TIME OF THE CRIME, PETITIONER HAD A MENTAL DISEASE OR IMPAIRMENT. THUS, IN ADDITION TO FAILING TO MAKE A PRIMA FACIE

CASE NO. GA067690
DEF NO. 01 DATE PRINTED 01/09/14

CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL, PETITIONER HAS FAILED TO SHOW PREJUDICE. THE PETITION MAKES NO SHOWING OF ANY REASONABLE PROBABILITY OF A DIFFERENT TRIAL OUTCOME.

THE PETITION IS DENIED.

A COPY OF THIS MINUTE ORDER IS MAILED VIA U.S. MAIL AS FOLLOWS:

ASALA KHONDZADEH
FEDERAL PUBLIC DEFENDERS OFFICE
321 EAST 2ND STREET
LOS ANGELES, CA 90012-4202

MIKE TRIEU
CDC # AE-4750
P.O. BOX 799001
SAN DIEGO, CA 92179-9001

JUDITH PETTIGREW D.D.A.
HABEAS CORPUS LITIGATION TEAM
320 W. TEMPLE ST. SUITE 540
LOS ANGELES, CA 90012

JULIE ANN HARRIS
CALIFORNIA ATTORNEY GENERAL
300 S. SPRING ST SUITE 1702
LOS ANGELES, CA 90013

ALAN ROSS, ESQ
316 W. SECOND ST.
LOS ANGELES, CA 90012

NEXT SCHEDULED EVENT:
PROCEEDINGS TERMINATED

SUPERIOR COURT, LOS ANGELES COUNTY, CALIFORNIA

[redacted]

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 01/17/2018 11:52 AM

Docket (Register of Actions)

PEOPLE v. TRIEU
Case Number S198929

Date	Description	Notes
12/23/2011	Petition for review filed	Defendant and Appellant: Mike Du Trieu Pro Per
12/27/2011	Record requested	
12/29/2011	Received Court of Appeal record	one doghouse
01/25/2012	Petition for review denied	
02/01/2012	Returned record	1 doghouse

Click here to request automatic e-mail notifications about this case.

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 01/17/2018 11:52 AM

Docket (Register of Actions)

TRIEU (MIKE DU) ON H.C.
Case Number S198931

Date	Description	Notes
12/23/2011	Petition for review filed	Petitioner: Mike Du Trieu Pro Per
12/27/2011	Record requested	
01/25/2012	Petition for review denied	
02/01/2012	Returned record	1 manila jacket

Click here to request automatic e-mail notifications about this case.

LODGED DOC. #8
CV 12-3365-VBF (CW)

Court of Appeal, Second Appellate District, Division Four - No. B234286

S198931

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re MIKE DU TRIEU on Habeas Corpus.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

Filed 11/17/11 P. v. Trieu CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MIKE DU TRIEU, Defendant and Appellant.	B226470 (Los Angeles County Super. Ct. No. GA067690)
In re MIKE DU TRIEU, on Habeas Corpus.	B234286

APPEAL from a judgment of the Superior Court of Los Angeles County, Suzette Clover, Judge. Affirmed.

ORIGINAL PROCEEDINGS; petition for a writ of habeas corpus. Writ denied.

Leonard J. Klaif, under appointment by the Court of Appeal, and Mike Du Trieu, in pro. per., for Defendant, Appellant and Petitioner.

No appearance for Plaintiff and Respondent.

Mike Du Trieu appeals from the judgment entered following his conviction by jury on one count of attempted murder. (Pen. Code, §§ 664/187, subd. (a).)[1] In addition to his appeal, appellant filed a petition for writ of habeas corpus in this court. We affirm the judgment and deny the habeas petition.

Dr. Mohamad Latif was a cardiologist with a medical practice in Glendale, California. Dr. Latif began treating appellant for hardening in his aortic valve around 1996, and he continued to see appellant in his office every three to four months after that. Appellant regularly obtained lab reports on his blood and brought those reports to his appointments with Dr. Latif.

On November 14, 2006, appellant came for a regularly-scheduled appointment with Dr. Latif and was brought into an examination room. When Dr. Latif entered the room, appellant was lying on the bed. Appellant asked Dr. Latif to look at the lab report, so Dr. Latif turned to examine the report. Dr. Latif's back was toward appellant while he examined the report.

Dr. Latif felt pain in his right shoulder, so he turned around and saw appellant attacking him with a knife. Dr. Latif stepped backwards and tripped over a treadmill machine. Appellant continued stabbing Dr. Latif in the left shoulder, lip, and under the left eye. Dr. Latif knocked the knife to the floor, and other employees in the office came and restrained appellant. Appellant pointed to the knife and said, "That is my knife." The entire incident lasted about one-and-a-half to two minutes.

Appellant accused Dr. Latif of killing appellant's mother, but Dr. Latif's office was unable to verify that appellant's mother had ever been a patient. Appellant had never spoken to Dr. Latif about his mother before. Dr. Latif was

---

[1] Further statutory references are to the Penal Code unless otherwise specified.

still suffering from some paralysis in both hands at the time of trial, despite having undergone surgery and physical therapy.

Appellant was charged by information with one count of attempted willful, deliberate, premeditated murder. (§§ 664/187, subd. (a).) It was further alleged that the victim was over 60 years of age and appellant inflicted great bodily injury on a person over 60 years of age (§ 1203.09, subds. (a), (f)), appellant personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)), and he inflicted great bodily injury, causing Dr. Latif to become comatose and suffer paralysis (§ 12022.7, subd. (b)).

During pretrial proceedings, two different defense attorneys raised doubts as to appellant's mental competence to stand trial pursuant to section 1368. Each time a doubt was declared, the court suspended the proceedings and appointed a medical professional to examine appellant pursuant to Evidence Code section 730. Appellant was examined by three different medical professionals, and after considering the reports, the court found appellant mentally competent to stand trial.

A *Marsden* hearing was held on June 28, 2007. (*People v. Marsden* (1970) 2 Cal.3d 118.) Appellant complained that he did not trust his attorney and that his attorney did not obtain some documents for him. The court denied the motion.

The court subsequently granted appellant's request to represent himself (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*)), although appellant changed his mind several times afterward, repeatedly asking for appointed counsel and then asking to represent himself again. Appellant retained private counsel before trial.

One of the issues appellant repeatedly raised throughout his *Faretta* requests was his belief that his attorneys were not obtaining evidence he needed or pursuing lab tests he wanted done. The transcripts indicate that the People provided the requested discovery, including documents that were recovered from appellant,

appellant's statements, tapes of witness statements, police reports, psychologist reports, paramedic reports, and photographs of the crime scene.

The record also indicates that the court granted appellant's requests to appoint an investigator, a confessions expert, and an expert in neurology, and authorized funds for the experts. Appellant requested more funds for the neurology expert at a March 2, 2009 hearing, but the court told appellant it could not authorize more funds for the expert until it received a report indicating what had already been done. After appellant's investigator asked to be relieved because appellant accused her of stealing documents from him, the court agreed to appoint a new investigator.

Appellant entered a plea of not guilty by reason of insanity. A jury trial was held, at which Dr. Latif was the only witness. The jury found appellant guilty of attempted murder and found true the allegations that it was deliberate, willful, and premeditated, and that appellant used a deadly weapon and caused great bodily injury, but found not true the allegation regarding the victim's age.

A jury trial was conducted to determine appellant's sanity at the time of the offense. Before the trial started, the court conducted a hearing to address appellant's *Faretta* motion. Appellant claimed that he told his attorney the reason he attacked Dr. Latif was that the medication prescribed by Dr. Latif had hurt him. He told the court that he did not intend to kill Dr. Latif and that he could have done so had he wanted to. The court denied the motion as untimely, stating that there was a jury "waiting outside." The court also denied the motion based on its observations of appellant during the trial, its belief that defense counsel had done a good job, and its belief that appellant's statements about his motive for the crime would not help his case.

Jeffrey Liu testified on appellant's behalf. Liu met appellant while they were both in jail. Liu was born in Taiwan and was familiar with a Chinese philosophy that it is a duty and a moral imperative for a son to avenge wrongdoing to a parent. Liu testified that appellant was born in China and had repeatedly told Liu and other inmates that he believed Dr. Latif killed his mother, so he was required to avenge her death. Liu tried to persuade appellant that he was not required to hold to that belief, but appellant was very "stubborn." Liu further testified that appellant had been a soldier in China and, according to a psychological evaluation, suffered from post traumatic stress disorder. According to Liu, just before committing the offense, appellant had learned from a pharmacist that the medications prescribed for him by Dr. Latif could interact in a fatal manner.

The jury found that appellant was sane at the time of the offense. The court denied appellant's motion for a new trial. The court sentenced appellant to a term of life with the possibility of parole, plus five years for the great bodily injury allegation (§ 12022.7, subd. (b)), and imposed and stayed a one-year term for the weapon allegation (§ 12022, subd. (b)(1)). Appellant filed a timely notice of appeal.

After review of the record, appellant's court-appointed counsel filed an opening brief asking this court to review the record independently pursuant to the holding of *People v. Wende* (1979) 25 Cal.3d 436, 441.

On April 26, 2011, we advised appellant that he had 30 days within which to submit any contentions or issues that he wished us to consider. On June 23, 2011, appellant filed a supplemental brief, raising four issues: (1) violation of his right to cross-examine witnesses pursuant to *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*); (2) failure to fund expert witnesses; (3) violations of *Brady v.*

Maryland (1963) 373 U.S. 83 (*Brady*); (4) violations of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). On June 28, 2011, appellant filed a first amended supplemental brief, raising three additional issues: (1) lack of mental competence to stand trial; (2) sufficiency of the evidence to support the jury's sanity finding; (3) violation of his right under *Faretta* to represent himself during the sanity phase of the trial. On July 11, 2011, appellant filed a petition for writ of habeas corpus, raising the same four claims raised in his initial supplemental brief on appeal. We address his claims seriatim.

"'*Crawford* . . . held that testimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the confrontation clause unless the witness is unavailable at trial and the defendant has a prior opportunity for cross-examination. [Citation.]'" (*People v. D'Arcy* (2010) 48 Cal.4th 257, 290.) Appellant's right to cross-examine witnesses under *Crawford* was not violated because his attorney cross-examined Dr. Latif.

Appellant contends that the failure to fund experts violated his right to present a defense. The trial court record and the superior court order regarding the appointment of defense experts, attached to appellant's supplemental brief, indicate that the court appointed and authorized funds for experts and investigators as requested by appellant.

"'[T]he term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence – that is, to any suppression of so-called "*Brady* material" – although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042-1043.) The record indicates that appellant received all the requested discovery. He has failed to meet his burden to

"'show a "reasonable probability of a different result,"'" had any further evidence been disclosed. (*Id.* at p. 1043.)

"Pursuant to *Miranda*, *supra*, 384 U.S. 436, 'a suspect [may] not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and, if indigent, to appointed counsel.' [Citations.]"[2] (*People v. Dykes* (2009) 46 Cal.4th 731, 751.) We reject appellant's *Miranda* claim on two grounds: (1) no statements to the police by appellant were admitted; (2) no objection was made in the trial court to any statements, and, "unless a defendant asserts in the trial court a specific ground for suppression of his or her statements to police under *Miranda*, that ground is forfeited on appeal." (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1194.)

"The criminal trial of a mentally incompetent person violates due process. [Citation.] However, a defendant is not incompetent if he can understand the nature of the legal proceedings and assist counsel in conducting a defense in a rational manner. [Citations.]" (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1047.) "'A defendant is presumed competent unless the contrary is proven by a preponderance of the evidence.' [Citation.]" (*People v. Turner* (2004) 34 Cal.4th 406, 425.) "On appeal, the reviewing court determines whether substantial evidence, viewed in the light most favorable to the verdict, supports the trial court's finding." (*People v. Lawley* (2002) 27 Cal.4th 102, 131.) The record indicates that the trial court twice suspended the proceedings, ordered evaluations of appellant's mental competence by three medical professionals, and subsequently

---

[2] Appellant lists *Miranda* as a claim in his brief on appeal but does not argue it in his brief. Generally, "issues and arguments not addressed in the briefs on appeal are deemed forfeited. [Citations.]" (*Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 19, fn. 12.) We address the issue because he raises it in his habeas petition.

found him competent based on the medical evaluations. The trial court's finding is supported by substantial evidence.

The defendant's claim of legal insanity presents a factual issue to be decided by the trier of fact. (*People v. Kelly* (1973) 10 Cal.3d 565, 574.) The jury found appellant sane at the time of the offense. Appellant has failed to meet his burden of establishing by a preponderance of the evidence that he was insane at the time of the offense. (*People v. Hernandez* (2000) 22 Cal.4th 512, 521.)

"*Faretta* holds that the Sixth Amendment grants an accused personally the right to present a defense and thus to represent himself upon a timely and unequivocal request. [Citation.] . . . [¶] [T]he timeliness of one's assertion of *Faretta* rights is critical." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 433.)

"'When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion.' [Citation.]" (*People v. Percelle* (2005) 126 Cal.App.4th 164, 175.) Factors for the court to consider in assessing an untimely *Faretta* request include "'the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.'" (*Ibid.*) In considering appellant's *Faretta* request, the trial court considered the quality of defense counsel's representation of appellant, the reasons for the request, and the stage of the proceedings. We find no abuse of discretion.

We have examined the entire record and are satisfied that no arguable issues exist, and that appellant has, by virtue of counsel's compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate

review of the judgment entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 112-113.)

DISPOSITION

The judgment is affirmed, and the habeas petition is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.